A

ZULPADLI & EDHAM

v.

INAI OFFSHORE & MARINE ENGINEERING SDN BHD (IN LIQUIDATION)

B

COURT OF APPEAL, PUTRAJAYA
SULAIMAN DAUD JCA
JEFFREY TAN JCA
ZAHARAH IBRAHIM JCA
C [CIVIL APPEAL NO: W-02-2804-2010]
17 JANUARY 2011

COMPANY LAW: *Winding up - Payment by company to solicitors - Remittance effected after presentation of winding up petition - Whether in*
D *contravention of s. 223 Companies Act 1965 - Whether there was an order of validation or charging order - Whether entire remittance void*

LEGAL PROFESSION: *Remuneration - Lien - Whether appellant entitled to a charge on property recovered or preserved - Whether lien of*
E *appellant could only be enforced by charging order - Whether property recovered under a judgment - Whether appellant had right to retain property when it was recovered by negotiation - Whether there was no lien - Legal Profession Act 1976, s. 123*

This was an appeal by the defendant/appellant, a firm of solicitors,
F against the orders pronounced in the application by the Liquidator of Inai Offshore & Marine Engineering Sdn Bhd (in liquidation) (hereinafter called Inai) for (i) a declaration that the sum of RM1,400,000 paid out of or transferred from the account of Inai to the appellant was void for contravention of s. 223 of the
G Companies Act 1965, and (ii) an order that the appellant pay the sum of RM1,400,000 to Inai, where the learned judge had allowed the liquidator's application to the extent of "RM971,336 less 22% being a portion of RM1,400,000" (computed to RM757,642.08). Thereupon, the learned judge ordered the
H appellant to pay RM757,642.08 to Inai. Against that order, the appellant appealed. Inai also appealed. Both appeals were heard together. Briefly, prior to its involuntary winding up, Inai had engaged the appellant to set aside a mareva injunction obtained by a creditor, one TCTL Engineering Sdn Bhd (TCTL) against Inai
I and to defend a winding-up petition and to negotiate with one Malaysian Marine & Heavy Engineering Sdn Bhd (MMHE) on its claims for payment for works executed by Inai for MMHE. The

claim of Inai against MMHE was amicably settled out of court in which MMHE paid a sum of RM12,000,000 to Inai. Unquestionably, the appellant had rendered legal service to Inai, for which the appellant had issued bills. It was contended that that RM1,400,000 was payment by Inai towards those bills and there was no dispute that the sum of RM1,400,000 was so remitted to the appellant. On 1 October 2009, Inai was ordered to be wound up by the High Court pursuant to a winding up petition presented by a creditor, one Mintmark Corporation Sdn Bhd. The payment or remittance of the said sum of RM1,400,000 was effected after presentation of that winding up petition. Given that payment was effected after presentation of the winding up petition, it was the stand of the liquidator of Inai that that payment was in contravention of s. 223 of the Companies Act 1965. However, it was the stand of the appellant that the appellant had a lien over the sums recovered from MMHE.

Held (unanimously dismissing appeal W-02-2804-2010; allowing appeal W-02-2536-2010)
Per Jeffrey Tan JCA delivering the judgment of the court:

(1) At common law, the appellant had the right to retain the property of Inai pending payment of its bills. But that property (RM12,000,000) was paid directly to Inai. Since it was never in its possession, the appellant could not have retained that RM12,000,000 pending payment of its bills. Without possession of the property, the appellant could only 'ask the court to direct the property recovered under a judgment obtained by his exertions to stand as security for his costs of such recovery'. The property (RM12,000,000) was not recovered under any judgment. The property was recovered by negotiation. In the case of property recovered by negotiation, there is no lien. (para 13)

(2) Section 123 of the Legal Profession Act 1976 stipulates that the court to declare an advocate and solicitor entitled to a charge on the property recovered or preserved is the court in which that advocate and solicitor has been employed to prosecute or defend, and in which that property has been recovered or preserved. The court below was not that court. As a matter of fact, there was no such court, as the property (RM12,000,000) was not recovered under any judgment. The

lien of the appellant, if any, be it under common law or statute, could only be enforced by a charging order. But the instant property was not recovered under a judgment, and a charging order was consequently out of the question, be it under common law or statute. (paras 14 & 20)

(3) A validation order under s. 223 was the only doable option. But there was no application from the appellant for such an order. Winding up had commenced against Inai on 29 June 2009, that was, at the time of the presentation of the petition of winding up (s. 219(2) of the Companies Act 1965). Without an order of validation, that remittance of RM1,400,000 to the appellant on 19 August 2009, which was clearly a disposition of the property of Inai after commencement of winding up, was void. Without a charging order or an order of validation, the entire remittance to the appellant was void. The entire remittance must be returned to Inai. (para 21)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan oleh defendan/perayu, satu firma peguam, terhadap perintah-perintah yang dijelaskan di dalam permohonan oleh Likuidator Inai Offshore & Marine Engineering Sdn Bhd (dalam likuidasi) (selepas ini dipanggil Inai) untuk (i) satu deklarasi bahawa jumlah RM1,400,000 yang dibayar dari atau dipindahmilik dari akaun Inai kepada perayu adalah tidak sah kerana bertentangan dengan s. 223 Akta Syarikat 1965, dan (ii) satu perintah bahawa perayu membayar jumlah RM1,400,000 kepada Inai, di mana yang arif hakim telah membenarkan permohonan likuidator ke tahap "RM971,336 kurang 22% sepotong dari RM1,400,000" (dikira kepada RM757,642.08). Kemudiannya, yang arif hakim memerintah perayu membayar RM757,642.08 kepada Inai. Terhadap perintah itu, perayu membuat rayuan. Inai juga merayu. Kedua-dua rayuan didengar bersama-sama. Secara ringkasnya, sebelum penggulungan tidak sengajanya, Inai telah mengambil perayu untuk mengenepikan injunksi Mareva yang diperolehi oleh pemiutang, satu TCTL Engineering Sdn Bhd (TCTL) terhadap Inai dan untuk mempertahankan satu petisyen penggulungan dan untuk berunding dengan satu Malaysian Marine & Heavy Engineering Sdn Bhd (MMHE) atas tuntutan-tuntutan bayaran untuk kerja-kerja yang telah dikendalikan oleh Inai untuk

MMHE. Tuntutan Inai terhadap MMHE telah diselesaikan secara baik di luar mahkamah di mana MMHE telah membayar jumlah RM12,000,000 kepada Inai. Tidak boleh dipersoalkan lagi, perayu telah memberi khidmat guaman kepada Inai, dan untuk itu perayu telah mengeluarkan bil-bil. Ia dihujahkan bahawa RM1,400,000 adalah bayaran oleh Inai untuk bil-bil tersebut dan tidak timbul pertikaian bahawa jumlah RM1,400,000 diserahkan kepada perayu. Pada 1 Oktober 2009, Inai diperintahkan untuk digulungkan oleh Mahkamah Tinggi menurut petisyen penggulungan yang diberi oleh pemiutang, satu Mintmark Corporation Sdn Bhd. Bayaran atau remitan jumlah RM1,400,000 tersebut dikuatkuasakan selepas penyampaian petisyen penggulungan. Oleh kerana bayaran telah dikuatkuasakan selepas penyampaian petisyen penggulungan, ia adalah pendirian likuidator Inai bahawa bayaran itu adalah bertentangan dengan s. 223 Akta Syarikat 1965. Bagaimanapun, ia adalah pendirian perayu bahawa perayu mempunyai lien ke atas jumlah wang yang telah didapat balik dari MMHE.

Diputuskan (sebulat suara menolak rayuan W-02-2804-2010; membenarkan rayuan W-02-2536-2010)

Oleh Jeffrey Tan HMR menyampaikan penghakiman mahkamah:

(1) Pada undang-undang common, perayu mempunyai hak untuk menyimpan harta Inai sementara menunggu bayaran bil-bil dari Inai. Tetapi harta itu (RM12,000,000) dibayar terus kepada Inai. Oleh kerana ia tidak pernah berada dalam milikannya, perayu tidak boleh menyimpan RM12,000,000 sementara menunggu bayaran bil-bilnya. Tanpa milikan ke atas harta itu, perayu hanya boleh 'meminta supaya mahkamah mengarahkan harta yang diperolehi itu di dalam penghakiman yang didapati melalui perbuatannya untuk berdiri sebagai sekuriti untuk kos-kos pemerolehan itu.' Harta itu (RM12,000,000) tidak diperolehi di dalam apa-apa penghakiman. Harta diperolehi melalui rundingan. Di dalam kes harta didapat balik melalui rundingan, tidak terdapatnya lien.

(2) Seksyen 123 Akta Profesion Undang-Undang 1976 menetapkan yang mahkamah yang mendeklarasikan peguambela atau peguamcara berhak kepada harta yang didapat balik atau dipertahankan adalah mahkamah di mana peguambela dan peguamcara itu dipilih untuk mendakwa atau membela, dan di mana harta itu telah didapat balik atau dipertahankan. Mahkamah ini bukanlah mahkamah itu. Sebagai perkara fakta,

tidak terdapat mahkamah seperti itu, kerana harta (RM12,000,000) tidak didapat balik di bawah apa-apa penghakiman. Lien perayu, jika adapun, sama ada di bawah undang-undang common atau statut, hanya boleh dikuatkuasakan melalui perintah bayaran. Tetapi harta ini tidak diperolehi di dalam penghakiman, dan perintah bayaran adalah mustahil, sama ada di bawah undang-undang common atau statut.

(3) Perintah pengesahan di bawah s. 223 adalah pilihan yang boleh digunakan. Tetapi tiada permohonan dibuat oleh perayu untuk perintah tersebut. Penggulungan telah bermula terhadap Inai pada 29 Jun 2009, iaitu, pada masa petisyen penggulungan telah dikemukakan (s. 219(2) Akta Syarikat 1965). Tanpa perintah pengesahan, remitan RM1,400,000 kepada perayu pada 19 Ogos 2009, yang dengan jelasnya pelupusan harta Inai selepas permulaan prosiding penggulungan, adalah tak sah. Tanpa perintah bayaran atau perintah pengesahan, seluruh remitan kepada perayu adalah tak sah. Seluruh remitan mesti dikembalikan kepada Inai.

Case(s) referred to:

Baronglow v. Willing & Thomas [2004] SADC 37 ***(refd)***

Canada (In White Resource Management Ltd v. Durish [1997] 154 DLR 4th 158 ***(refd)***

Emden v. Carte [1881] Ch 311 ***(refd)***

Guy v. Churchill [1887] Ch 489 ***(refd)***

In Re Ashmark Limited (In liquidation) 2 IR 10 ***(refd)***

In Re Born [1900] 2 Ch 433 ***(refd)***

In Re Clayton [1940] 1 Ch 539 ***(refd)***

Kimoyama Elektrik (M) Sdn Bhd v. Metrobilt Construction Sdn Bhd [1990] 2 CLJ 795; [1990] 2 CLJ (Rep) 253 HC ***(refd)***

Lian Keow Sdn Bhd (in liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 1 LNS 44 SC ***(refd)***

Meguerditchian v. Lightbound and Others [1917] 2 KB 298 ***(refd)***

North West Construction Co Pty Ltd (in liquidation) v. Marian [1965] WAR 205 ***(refd)***

Re Gray's Inn Construction Co Ltd [1980] 1 All ER 814 ***(refd)***

Re Meter Cabs, Limited [1911] 2 Ch 557 ***(refd)***

Re Motherwell [1927] 62 DLR 130 ***(refd)***

Salt v. Mohammedan and Hindu Endowments Board [1941] 1 LNS 128 CA ***(refd)***

Saw Ching Ho & Anor v. Tan Ah Kui [1969] 1 LNS 165 HC ***(refd)***

Legislation referred to:
Advocates & Solicitors Ordinance 1947, s. 89
Companies Act 1965, s. 218, 219(2), 223
Legal Profession Act 1976, s. 123

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, vol 44(1) paras 244 & 254
McPherson, *The law of Company Liquidation* 4th edn, p 222

For the appellant - Zeffree Zainudin; M/s Jeffry Azmi
For the respondent - Prakash Lachimanan; M/s Mathews Hun Kandiah

[Editor's note: For the High Court judgment, please see Inai Offshore & Marine Engineering Sdn Bhd v. Zulpadli & Edham [2010] 1 LNS 1339.]

Reported by Suhainah Wahiduddin

JUDGMENT

Jeffrey Tan JCA:

[1] This is an appeal by the defendant/appellant, a firm of solicitors, against the orders pronounced in the application by the Liquidator of Inai Offshore & Marine Engineering Sdn Bhd (in liquidation) (hereinafter called Inai) for (i) a declaration that the sum of RM1,400,000 paid out of or transferred from the account of Inai to the (appellant) was void for contravention of s. 223 of the Companies Act 1965, and (ii) an order that the (appellant) do pay the sum of RM1,400,000 to Inai, where the learned judge allowed the liquidator's application to the extent of "RM971,336 less 22% being a portion of RM1,400,000" (computed to RM757,642.08).

[2] To be more precise, the learned judge declared (i) that the sum of RM757,642.08 was paid or transferred to the appellant in contravention of s. 223 of the Companies Act 1965, but (ii) that the sum of RM642,357.92 was not paid or transferred to the appellant in contravention of the same said section. Thereupon, the learned judge ordered the appellant to pay RM757,642.08 to Inai (see order dated 30 July 2010 at p. 13 of the Appeal Record). Against that order, the appellant appealed. Inai also appealed (W02-2536-2010). Both appeals were argued together.

[3] The pertinent facts were as follows. Prior to its involuntary winding-up on 1 October 2009, Inai had engaged the appellant to set aside *a mareva* injunction obtained by a creditor, one TCTL Engineering Sdn Bhd (TCTL), against Inai. Inai had also engaged the appellant to defend a winding-up petition (Kuala Lumpur D2-28-492-2009) and to negotiate with one Malaysian Marine & Heavy Engineering Sdn Bhd (MMHE) on its claims for payment for works executed by Inai for MMHE. In its negotiations with MMHE, the appellant met with success, but only after the appellant had issued a s. 218 (of the Companies Act 1965) notice to MMHE, had set aside the Fortuna injunction obtained by MMHE, had successfully defended all appeals by MMHE against the setting aside of the said Fortuna injunction, and had served a winding-up petition on MMHE. Thereafter, the claim of Inai against MMHE was amicably settled out of court (see 72AR). MMHE paid a sum of RM12,000,000 to Inai on 18 August 2009.

[4] Unquestionably, the appellant had rendered legal service to Inai, for which the appellant had issued the following bills. For the legal service involving TCTL, the appellant had issued a bill of RM971,336,00, which was the exact sum (before being reduced by 22%) that the learned judge held that payment thereof to the appellant was in contravention of the said s. 223. And for the legal service involving MMHE, the appellant had issued a bill of RM843,768.05.

[5] It was contended that that RM1,400,000 was payment by Inai towards those bills (see 77AR para. 20). That payment was effected on the written instructions of two directors of Inai on 18 August 2009 (see 234AR) to Al Rajhi Bank who duly debited the account of Inai and credited the sum of RM1,400,000 into the account of the appellant on 19 August 2009 (see 235AR).

[6] There was no dispute that the sum of RM1,400,000 was so remitted to the appellant on 19 August 2009. There was also no dispute to the following facts. Inai was ordered to be wound up by the High Court at Kuala Lumpur on 1 October 2009 pursuant to a Winding-up Petition (D1-28-482-2009) presented by a creditor, one Mintmark Corporation Sdn Bhd, on 29 June 2009. That petition had been served (on 12 August 2009) as well as advertised (on 13 August 2009, 14 August 2009, 19 August 2009, 20 August 2009 and 27 August 2009. The payment or

remittance of that sum of RM1,400,000 was effected after presentation of that winding-up petition by Mintmark (D1-28-482-2009). The legal service of the appellant was not rendered to Inai at the behest of the liquidator.

[7] Given that payment was effected after presentation of the winding-up petition (D1-28-482-2009), it was the stand of the liquidator of Inai that that payment was in contravention of s. 223 of the Companies Act 1965, which reads:

> Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void.

[8] On the other hand, it was the stand of the appellant that the appellant had a lien over the sums recovered from MMHE.

[9] Mr Praskash Lachimanan for the liquidator agreed that at common law a solicitor has a lien over monies recovered under a judgment obtained by his exertions. But notwithstanding whatever lien, Mr Praskash contended that the bills of the appellant could only be paid with a charging order obtained under s. 123 of the Legal Profession Act 1976.

[10] Diverse authorities were cited both here and below on the law relating to the lien of a solicitor. Suffice it to say that it was the finding of the learned judge that the appellant had a lien over the sums recovered from MMHE, to the extent of the costs of the proceedings that concerned MMHE but not TCTL (see 38AR). With that latter finding, the learned judge then held that "it was not necessary for (him) to order validation of the remittance under s. 223" (see 40AR). Those findings, as well as the reasons for them, were thus set out in following passages of the judgment of the learned judge:

> It will be seen that the terms of Section 123 are permissive and not mandatory in nature. The court "may" declare the solicitor entitled to the charge in respect of property recovered or preserved. Logically, if the property recovered or preserved has been willingly utilised by the client to pay the solicitor's costs, where is the necessity to still apply to court to obtain a charge over the property to ensure the payment of the very same costs? In a sense, where the solicitors legal costs have been paid out of

A the property or funds recovered or preserved for the benefit of his client as the fruits of the litigation, the common law lien is perfected. The lien is created when the solicitor performs the litigation work and renders a bill; the lien is perfected when the property or fund is received by or on behalf of the client; the lien is enforced where a charging order is obtained. This is the reasoning that is found in *Baronglow Pty Ltd v. Willing (Thomas Intervener)* ... It should also not make any difference into whose hands the property or fund is initially placed. As stated in another Australian case, namely *North West Construction Co Pty Ltd (in liquidation) v. Marian* [1963] WAR 205, the solicitors' common law lien over property recovered or preserved, while not a true possessory lien, nevertheless attaches to the property 'regardless of possession'. This case, as well as in *Re Meter Cabs supra*, and *Guy v. Churchill* [1887] Vol XXXV, Ch 489, explains the equitable basis for accepting the common law lien ... (see 35 - 36AR)

...

The principle and logic is plain. By the exertions of his effort for his client, the solicitor has added value to the client, and therefore it is only fair that he be paid as a secured Creditor for this effort. In the context of Winding-Up, when the solicitor is paid on this basis, they cannot surely be said to be stealing a march on the unsecured Creditors, for the simple reason that he has added value to the Company. In any event, there would be little logic if the law allows a solicitor who act for the Liquidator to be paid his fees even in the course of Winding-Up, and yet deny the payment of fees to a solicitor who has recovered and preserved property for the client but paid after the commencement of Winding-Up. On the facts of this case, the [Appellant] has added RM12,000,000 in value to the assets of [Inai] ... (see 37AR)

...

Since the lien is a particular lien, as earlier noted, it cannot therefore be available for the general balance of account between the solicitor and the client but extends only to the costs of the proceedings in which the property is recovered. On the facts of this case, the recovery is in respect of the proceedings against MMHE and the monies were recovered from MMHE. On the facts and on the law therefore, this lien can only attach against the monies constituting the costs of the particular proceedings, and that will be RM843,768.95 less a 22% reduction agreed by the [Appellant]. (see 39AR)

[11] Certainly, at common law a solicitor has a right to retain a client's document and property pending payment of the solicitor's bill. "A 1950 English case, *Barratt v. Gough-Thomas*, cited at 2 All ER 1048, and followed in *Canada (in White Resource Management Ltd v. Durish* [1997] 154 DLR 4th 158, used these words: "The nature of a solicitor's general retaining lien has more than once been authoritatively stated. It is a right at common law depending, it has been said, on implied agreement. It has not the character of an encumbrance or equitable charge. It is merely passive and possessory, that is to say, the solicitor has no right of actively enforcing his demand. It confers on him merely the right to withhold possession of the documents or other personal property of his client or former client. "From *Re Motherwell* [1927] 62 DLR 130 (Ontario Supreme Court): "The right of a solicitor to a lien on the documents of his client which come to his hands in the course of his employment is a well recognised right, and one which ... is for the benefit of clients as it often enables or induces solicitors to carry on proceedings for the client which they might otherwise be unwilling to do; but it is a right which is subject to certain qualifications. "The right of a solicitor in documents in his possession cannot exceed that of his client, and if third persons have a joint interest in them, or for any other cause have a right to call on the client to produce them, the lien of the solicitor cannot debar them of that right. "The solicitor's lien creates no charge upon the property, if any, to which the documents relate, it is not like an equitable mortgage by deposit; the lien is merely a passive right of retainer, and cannot be actively enforced as in the case of other liens. So long as it exists it has been held that the solicitor can withhold the documents from inspection by his client, or anyone claiming under him; although it has been held that the client can by *subpoena duces tecum* served on the solicitor compel him as a witness to produce them in evidence in support of the client's case" (www.duhaime.org/LegalDictionary).

[12] We adopt the commentary in *Halsbury's Laws of England* (4th edn vol. 44(1) paras. 244 & 254) as a correct proposition of the common law on the lien of a solicitor:

> 244. Solicitors rights. At common law a solicitor has two rights which are termed liens. The first is a right to retain property already in his possession until he is paid costs due to him in his professional capacity and the second is the right to ask the court to direct the personal property recovered under a judgment obtain by his exertions stand as security for his costs of such recovery.

In addition, a solicitor has by statute a right to apply to the court for a charging order on property recovered or preserved through his instrumentality in respect of his taxed costs of the suit, matter of proceeding prosecuted or defended by him.

254. Particular Lien on property recovered. Apart from statute a solicitor has at common law a lien which may be actively enforced over a fund or the proceeds of a judgment recovered for the client in the course of litigation or arbitration by the solicitor's exertions, but not over the fruits of negotiation without litigation. The existence of the particular lien does not depend on the proprietary or possessory relationship of the solicitor to the property. This lien, although always referred to as a "lien", is more accurately described as a mere right to ask for the court's intervention for the solicitor's protection when, having obtained a judgment for his client, he finds that there is a probability of the client depriving him of his costs. It is a right to ask the court to charge the property in favour of the solicitor and until that is done the solicitor has no right to the money. The lien is a particular lien. It is not therefore available for the general balance of account between the solicitor and the client but extends only to the costs of the proceedings in which the property is recovered, including the costs of protecting the solicitor's right to those costs, of establishing the solicitor's retainer if it is disputed and of matters incidental to the recovery. The lien may be asserted by the solicitor although his right to recover the costs may be barred by lapse of time.

[13] Thus, at common law the appellant had the right to retain the property of Inai pending payment of its bills. But that property (RM12,000,000) was paid directly to Inai (see 236AR). Since it was never in its possession, the appellant could not have retained that RM12,000,000 pending payment of its bills. A solicitor has two rights. "The first is a right to retain property already in his possession until he is paid costs due to him in his professional capacity and the second is the right to ask the court to direct the personal property recovered under a judgment obtain by his exertions [to] stand as security for his costs of such recovery" (see *Halsbury*'s *supra* para. 244). But on the facts, the lien of the appellant, if any, could not be under the 1st category, that is, the right to retain the property of Inai pending payment of its bills.

[14] Without possession of the property, the lien of the appellant could only be under the second category, in which case, the appellant could "ask the court to direct the property recovered under a judgment obtained by his exertions (to) stand as security

for his costs of such recovery (*Halsbury*'s *supra* para. 244). "This common law has not been abrogated by the statute [(UK) Solicitors Act 1860] or affected by the winding-up and all I am really asked to do is to give the statutory charge in aid of the already existing common law lien which is prior to any right of the official receiver or liquidator" (*In re Born* [1900] 2 Ch 433, 435, per Farwell J). All except that the property (RM12,000,000) was not recovered under any judgment. The property was recovered by negotiation.

[15] In the case of property recovered by negotiation, there is no lien (*Halsbury*'s *supra* para. 254). That principle was laid down in *Meguerditchian v. Lightbound and Others* [1917] 2 KB 298, where documents were recovered by negotiation, and where it was held (Swinfen Eady, Bankes LJJ and Bray J) that the property over which the lien is sought must have been recovered or preserved as the result of some sort of legal proceedings and not merely of negotiations between parties. Swinfen Eady LJ held that a charging order which can be obtained under the (UK) Solicitors Act 1860 on property recovered or preserved only referred to litigation, while Bankes LJ disagreed that a solicitor's lien can be applied to the facts of the case.

[16] *Meguerditchian v. Lightbound* was cited in *Salt v. Mohammedan and Hindu Endowments Board* [1941] 1 LNS 128, where, on the issue as to whether a solicitor has a lien for his costs over trust funds, it was held (McElwaine CJ (SS) Terrell Ag CJ (FMS) and Aitken Ag JA) that the money was paid to the solicitor for a specific purpose and that the solicitor could have no lien upon it apart from what might arise from carrying on that purpose. Aitken Ag JA unequivocally agreed that a solicitor does not acquire any lien on the fruits of a mere negotiation without litigation.

> Before I close I should perhaps, mention the case of *Meguerdtchian v. Lightboun*, [1917] 2 KB 298, in which the Court of Appeal in England laid it down that a solicitor does not acquire any lien on the fruits of a mere negotiation without litigation. I confess that this case came somewhat as a surprise to me, but the principle underlying that decision appears to be embodied in the following passage in the judgment of Bankes L.J. at page 308:
>
> > On the question of law it seems to me quite impossible to contend successfully that the rule of law which has been hitherto applied to the solicitor's lien in respect of property recovered can be applied to a case such as this. Mr. Leslie Scott has claimed that the underlying principle should be

A applied to it. With great respect to him, I can see a very good reason why the principle should be applied in cases where there are proceedings, whether they consist of an action or arbitration, but I can see very good reasons why they should not be applied when the solicitors are left free to take whatever course they choose in order to secure a compromise.

B

At any rate it seems to offer yet another reason why this appeal should be dismissed, and with costs.

C **[17]** Indeed, it ought to be noted that property was recovered or preserved under a judgment/order in the following authorities cited by the learned judge. In *Baronglow v. Willing & Thomas* [2004] SADC 37, there was a consent judgment. In *Guy v. Churchill* [1887] Ch 489, there was also a judgment. And in *North West Construction Co Pty Ltd (in liquidation) v. Marian* [1965] WAR 205, the court had sanctioned the compromise. Admittedly, in *Re Meter Cabs, Limited* [1911] 2 Ch 557, there was no judgment. But the arbitration between the parties was settled with the consent of the liquidators of the parties.

D

E **[18]** The said property (RM12,000,000) was recovered by negotiation. Under common law, the appellant could not obtain a charging order. But alas, even under statute law, the appellant could obtain a charging order, certainly not from the court below.

F **[19]** Section 123 of the Legal Profession Act 1976 (which is identical to s. 89 of the repealed Advocates & Solicitors Ordinance 1947) reads:

G Any court in which an advocate and solicitor has been employed to prosecute or defend any suit, matter or proceeding may at any time declare the advocate and solicitor entitled to a charge on the property recovered or preserved in such suit, matter or proceeding for such advocate and solicitor's taxed costs in reference to that suit, matter or proceeding, and may make such orders for the taxation of the costs and for raising money to pay,

H or for paying, the costs out of the property as it thinks fair and reasonable, and all conveyance and acts done to defeat, or operating to defeat, that charge shall, except in the case of a conveyance to a *bona fide* purchaser for value Without notice, be void as against the advocate and solicitor:

I Provided that no order shall be made if the right to recover the costs is barred by the Limitation Act 1953.

[20] In effect, s. 123 of the LPA stipulates that the court to declare an advocate and solicitor entitled to a charge on the property recovered or preserved is the court in which that advocate and solicitor has been employed to prosecute or defend, and in which that property has been recovered or preserved. The court below was not that court. As a matter of fact, there was no such court, as the property (RM12,000,000) was not recovered under any judgment. It comes down to this. The lien of the appellant, if any, be it under common law or statute, could only be enforced by a charging order (see *Saw Ching Ho & Anor v. Tan Ah Kui* [1969] 1 LNS 165, where Sharma J held that with a charging order under s. 89 of the Advocates & Solicitors Ordinance 1947, "the costs have to be taxed", and *Emden v. Carte* [1881] Ch 311, where it was held by Fry J that it is the duty of the judge, when declaring a solicitor entitled to a charge upon the property recovered or preserved in an action, to limit the order to costs properly incurred in recovering or preserving the property; but see *In Re Clayton* [1940] 1 Ch 539, where it was held by Moron J that the general principle is to give a solicitor a reward and therefore a wider charge). But the instant property was not recovered under a judgment, and a charging order was consequently out of the question, be it under common law or statute. Even if it could be accepted that the property was recovered under legal proceedings, that is, on account of the winding-up petition against MMHE, yet it remained that the lien of the appellant could only be enforced by a charging order which was not obtained.

[21] On the facts of the present case, a validation order under s. 223 was the only doable option. But there was no application from the appellant for such an order. Winding-up had commenced against Inai on 29 June 2009, that is, at the time of the presentation of the petition of winding up (see s. 219(2) of the Companies Act 1965). Without an order of validation, that remittance of RM1,400,000 to the appellant on 19 August 2009, which was clearly a disposition of the property of Inai after commencement of winding-up, was void (see *Lian Keow Sdn Bhd (in liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 1 LNS 44; *Kimoyama Elektrik (M) Sdn Bhd v. Metrobilt*

A *Construction Sdn Bhd* [1990] 2 CLJ 795; [1990] 2 CLJ (Rep) 253; *Re Gray's Inn Construction Co Ltd* [1980] 1 All ER 814); and *In Re Ashmark Limited (in liquidation)* 2 IR 10, amongst a host of authorities on s. 223 or equipollent provision). "The disposition rendered void is void at the time it takes place" (see *McPherson*
B *The Law of Company Liquidation* 4th edn, p. 222).

[22] Without a charging order or an order of validation, the entire remittance to the appellant was void. The entire remittance must be returned to Inai.

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[23] For the above reasons, we unanimously dismiss appeal W-02-2804-2010 and allow appeal W-02-2536-2010, with costs of both appeals being awarded to Inai. We unanimously order the appellant to return the entire remittance to Inai.

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